Justice Sutherland, One of Us

ALEX KOZINSKI

CONSTITUTIONAL interpretation is a messy business; it always has been. Since the Supreme Court discovered early in the last century that it could strike down laws repugnant to the Constitution, there has been a lively debate over the proper scope of that power. The precise terms of the debate have changed over time, but the outline has remained the same: Giving judges broad authority to invalidate legislation interferes with the people's right to govern themselves, transferring power to an unelected, politically unresponsive oligarchy; a narrow power of judicial review abandons individuals and minority groups to the tender mercies of the majority. After almost two centuries of trial and error, we are no closer to developing a comprehensive theory of constitutional adjudication than physicists are to developing a unified field theory.

The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights, by Hadley Arkes (Princeton, 312 pp., $29.95)

At the heart of any constitutional issue lie two closely related questions. First, what is the scope of the powers the majority may properly exercise through the instruments of government? Second, in what areas must individuals be free from government restraint? During much of our constitutional history these questions were resolved by references to a theory of "natural rights," which defined the individual's relationship to the state less by parsing minutiae of constitutional text than by drawing on transcendent principles of fairness and justice.

Natural-rights theory fell into disrepute after it was used as a basis for invalidating much New Deal social legislation, and has since been treated largely with disdain by judges, lawyers, and constitutional theorists. In his new book, Hadley Arkes, an Amherst professor and *NR* contributing editor, seeks to rekindle interest in natural-rights theory and rehabilitate a Supreme Court Justice who was one of its staunchest proponents. It is a book worth serious consideration.

Visit a constitutional-law class in any law school today and chances are you will hear George Sutherland mentioned, if at all, in derisive and dismissive terms. He is typically lumped in with the rest of the "Four Horsemen"—the Supreme Court Justices (Sutherland, McReynolds, Van Devanter, and Butler) who frequently voted as a bloc to invalidate New Deal legislation. Sutherland's jurisprudence gets virtually no attention, and his character is often confused with that of McReynolds, a cantankerous bigot. Mr. Arkes works hard to rescue Sutherland from the lowly ranks to which modern scholarship has consigned him. He points out that Sutherland was in many ways the antithesis of McReynolds: as a person, he was respectful, gentlemanly, and kind; as a legal scholar, he was thoughtful and erudite.

Many of Sutherland's ideas, Mr. Arkes notes, were thoroughly modern and have found a lasting place in our jurisprudence. In two cases involving statutes that set minimum wages for women but not for men, Sutherland wrote opinions stressing the irrationality of laws that presume women less capable than men of fending for themselves in the marketplace. In another case, he reversed the convictions of seven black men (the so-called "Scottsboro boys") who had been sentenced to death in Alabama for raping two white women. The ruling, grounded on the inadequacy of the defendants' court-appointed lawyers, came three decades before the Supreme Court announced that criminal defendants are generally entitled to be represented by counsel. In yet another case, Sutherland upheld the President's broad authority to act, even without the consent of Congress, in the area of foreign relations. Around the same time, Sutherland held that Congress could bar the President from removing members of independent agencies—an opinion that played a prominent role in the Supreme Court's recent decision upholding the independent-counsel statute.

These achievements, Mr. Arkes complains, have been obscured because few have bothered to take a careful look at the theory that animated Sutherland's approach to constitutional law. Arkes spends much time analyzing and explaining Sutherland's work to show

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that it reflects, not an obdurate refusal to yield to the Zeitgeist, but an integrated theory about individual rights and the workings of government.

Reading through Sutherland's opinions, one comes to agree with Arkes that this was, indeed, a thoughtful jurist with a carefully honed sense of the proper interplay between governmental power and personal freedom. But his jurisprudence was certainly not flawless. First, many of Sutherland's opinions rest on the premise that the Constitution protects liberty of contract—a premise Sutherland did not justify or examine. He offered no answer to other Justices who argued that nothing in the Constitution protects that right, nor did he have a satisfactory response to the argument that the Supreme Court has often approved significant limitations thereon. Sutherland similarly dodged a number of difficult constitutional issues in the Scottsboro case. While the result he reached is consistent with modern notions of justice and due process, he failed to explain how Alabama could have a constitutional duty to appoint *effective* counsel when the Court had not yet held that the states have a constitutional duty to appoint any counsel at all.

Second, Sutherland frequently based his conclusions on anachronistic legal technicalities. For example, in 1932 he struck down an Oklahoma statute that required a certificate of necessity as a condition of manufacturing or distributing ice. Sutherland's opinion turns on his conclusion that the ice business was not "affected with a public interest," and thus could not be subjected to such pervasive regulation. But, as Brandeis pointed out in dissent, if the Oklahoma legislature had concluded that ice was a commodity of great public importance in that state, what basis did the Court have to disagree?

Constitutional scholars point to decisions like these in arguing that Sutherland and other natural-rights theorists merely read into the Constitution their own notions of public policy. The implication is that current constitutional doctrine is more objective and more firmly rooted in the Constitution's text. Lest we focus on the mote in Sutherland's eye and miss the beam in our own, it's worth considering how dramatically modern jurisprudence departs from the text and structure of the Constitution.

There are, in fact, three ways the modern Supreme Court has slipped its constitutional moorings. The first is the best known and the most controversial: the practice of announcing unenumerated rights (that is, rights that do not explicitly appear in the Constitution's text), such as the right to travel, to marry, or to use contraceptives. Without questioning the legitimacy of any of these rights, one nonetheless has to wonder why the right to make contracts is not also a legitimate candidate for inclusion. Entering into contracts—for employment, for housing, for the purchase and sale of property—is one of the most important expressions of personal autonomy. If you doubt me, try imagining what life would be like if you woke up tomorrow and learned you were barred from entering into any legally binding arrangements. Yet Sutherland's assumption that the Constitution protects—to some degree at least—liberty of contract is greeted with hoots of laughter by the same scholars and jurists who most vehemently support other unenumerated rights.

The second way modern jurisprudence escapes textual constraints is the converse of the first: ignoring constitutional provisions that are actually there. As Professor Sanford Levinson of the University of Texas points out in a compelling article aptly titled "The Embarrassing Second Amendment," a strong constitutional argument can be made that there are significant limits on the government's power to control the private possession of firearms. This argument has never been given serious consideration because the principle protected by the Second Amendment is repugnant to most academics and jurists. There are other constitutional provisions, like the Ninth Amendment—not to mention the Framers' central assumption that the Federal Government would be a government of limited powers—that have, to borrow a phrase from Judge

Bork, fallen into desuetude for lack of judicial attention.

Last, and perhaps most pernicious, is the judicial practice of emphasizing certain favored constitutional provisions while giving a narrow compass to disfavored ones. Consider, for instance, the degree of judicial attention lavished on the First Amendment, which has been read to protect activities as disparate as flag-burning, nude dancing, and libel. Similarly favored are the rights of the accused, which have been interpreted so as to give rise to the *Miranda* litany, the right to counsel in all serious criminal proceedings, and the right to vastly heightened judicial scrutiny in cases involving the death penalty. By contrast, the Contract Clause has been read so parsimoniously as to strip it of almost any practical application, and the Takings Clause has been so encrusted with obstacles as to place any effort to secure judicial relief off limits for the impecunious or the faint of heart. Nothing in the text of these provisions justifies such disparate treatment; it's that those involved in making constitutional law tend to favor some and disfavor others.

Compared to modern jurisprudence, Sutherland's work is a model of restraint and consistency. Though he based many of his constitutional rulings on an unenumerated liberty of contract, this was a right recognized in state and federal courts long before his time. And his natural-rights approach did not stop with freedom of contract, but extended to freedom of the press, representation at trial, equal treatment without regard to sex. The tradition on which he relied, moreover, has deep philosophical roots and was clearly embraced by the Founding Fathers. How else could the Declaration of Independence refer confidently to "unalienable rights"—rights by definition pre-dating the Constitution?

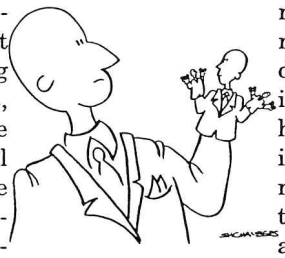
What Sutherland lacked was a body of constitutional scholarship to support his views. We are more fortunate. A new generation of scholars is challenging modern constitutional orthodoxy, and their work frequently provides support for Sutherland's approach. This body of scholarship includes groundbreaking work on the Ninth Amendment by Boston University's Randy Barnett; finely honed historical analysis of natural-rights jurisprudence by University of Minnesota Professor Suzanna Sherry; a provocative article by Northwestern University Professor Gary Lawson (with Patricia Granger) casting new light on the scope of federal power under the "Necessary and Proper" Clause; and highly original writings by Yale Law Professor Akhil Amar raising doubts about much of the Supreme Court's Fourth Amendment jurisprudence.

Mr. Arkes's work is a welcome addition to this emerging body of constitutional thought. If given the attention it deserves, it may well fulfill both objectives embodied in its title. □

What Formed the Founders

FORREST McDONALD

IT IS a cliché among historians that each generation tends to reshape its perception of the past to make it accord with its own biases and preoccupations: the dictatorship of the Zeitgeist. From the Progressive Period through the New Deal, for example, the American Founding was seen largely as the product of struggles between economic "haves" and "have nots," the former triumphing with the establishment of the Constitution. During the Sixties and Seventies, historians began to read the Founding in ideological terms, the most fashionable version being that the Framers were impelled by the revival of interest in the ancient republics, which were seen as militant and anti-capitalistic participatory democracies. More recently, as is exemplified by these two works, the focus has shifted again: the Founders were concerned with none of the above, but with religion and law.



The Myth of American Individualism: The Protestant Origins of American Political Thought, by Barry Alan Shain (Princeton, 394 pp., $39.50)

The Language of Liberty, 1660–1832: Political Discourse and Social Dynamics in the Anglo-American World, by J. C. D. Clark (Cambridge, 404 pp., $59.95)

Barry Alan Shain's message about the Founding is that, for all the Revolutionary generation's talk about rights and liberty, it understood those matters not in individualistic terms but collectively and communally. Indeed, except for freedom of conscience and its counterpart, individual salvation, the very idea of individualism was relatively new and not widely accepted. Even in regard to salvation it was generally agreed that—because of original sin—no one could obtain it without the reinforcing moral support of and policing by the community. The right to liberty was the right of the community to defend itself against outside interference and against heterodoxy within. Belief in individual rights did not seriously begin to emerge until the nineteenth century, and until well into the twentieth individual rights were always regarded as subordinate to the rights of the community.

Surprising as these observations may appear, they are not entirely original with Mr. Shain. Such historians and political scientists as Ron Peters, John Roche, Robert Palmer, William Nelson, and Michael Kammen have written along the same lines. Two features of Shain's work, however, make it especially valuable. One is the thoroughness with which he has built his case on primary sources, especially sermons and political tracts, as well as on secondary literature. The other is his location of the origins of Americans' values: not in classical republicanism, nor in rational humanism, but in reformed Protestant Christianity.

If Mr. Shain's analysis has a weakness, it is one that arises from a strength. He is concerned with what ordinary Americans thought and believed, not with "elite opinion," and that is to the good. But elites cause things to happen, and holders of elite opinion in the Founding period were powerfully influenced by the publication of *The Wealth of Nations* and its

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